

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WESTERN SHOWCASE HOMES, INC.,)

Plaintiff,)

vs.)

FUQUA HOMES, INC.,)

Defendant.)

2:09-cv-02341-RCJ-RJJ

ORDER

_____ This case arises out of the alleged failure of Defendant to pay commissions owed to Plaintiff for sales of Defendant's products in Canada. Pending before the Court is Defendant's Motion to Change Venue (#3). For the reasons given herein, the Court denies the motion.

I. FACTS AND PROCEDURAL HISTORY

In November 2007 Phil Daniels, President and CEO of Defendant Fuqua Homes, Inc. ("Fuqua"), traveled to Las Vegas, Nevada to negotiate an agreement with Plaintiff Western Showcase Homes, Inc. ("Western") for Western to act as the exclusive sales representative for Fuqua's manufactured homes in Canada and other territories as agreed from time to time (the "Exclusive Territory"). (Compl. ¶¶ 5, 8). On November 10, 2007 Daniels traveled to Las Vegas again, this time with other Fuqua representatives, to sign a dealer representative agreement (the "Agreement"). (*Id.* ¶ 6). From November 2007 through February 2008, Fuqua representatives met

1 with Western representatives several times in Las Vegas to execute the details of the Agreement.
2 (*Id.* ¶ 7). Under the Agreement, Western was to receive an 11% “discount” on all orders accepted
3 by Fuqua originating in the Exclusive Territory during the term of the agreement. (*Id.* ¶ 10).
4 Western alleges that Fuqua failed to pay discounts totaling \$40,215.93 for three sales invoiced in
5 August and October of 2008. (*Id.* ¶ 16).

6 Plaintiff sued Defendant in the Clark County District Court on four causes of action: (1)
7 Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Unjust
8 Enrichment; and (4) Intentional Interference with Contractual Relations. Defendant removed to this
9 Court based on diversity of citizenship¹ and has now moved under Rule 12(b)(3) for a transfer of
10 venue to the Northern District of Texas.

11 II. LEGAL STANDARDS

12 When a court makes a determination of venue under Rule 12(b)(3), the well-pled allegations
13 of the Complaint are taken as true, and any evidence submitted by the non-movant in opposition
14 to the Rule 12(b)(3) motion is viewed in the light most favorable to the non-movant. *Ginter ex rel.*
15 *Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 448–49 (5th Cir. 2008). Whether venue

16
17 ¹Plaintiff claims only \$40,215.93 in damages for breach of contract and at least \$10,000
18 for intentional interference with contractual relations. The other claims for bad faith and unjust
19 enrichment appear implausible under the facts alleged. However, it is legally plausible that the
20 claim for intentional interference with contractual relations is worth at least \$34,785.08.
21 Furthermore, Plaintiff has claimed an indeterminate amount in attorneys fees, which considered
22 together with compensatory damages can satisfy the requisite jurisdictional amount if the
23 underlying statute supports an award of attorneys fees. *See Galt G/S v. JSS Scandinavia*, 142 F.3d
24 1150, 1155 (9th Cir. 1998). Nevada and Texas alike permit attorneys’ fees in contract actions
based on contractual clauses providing for them, *see Kelly Broad. Co., Inc. v. Sovereign Broad.,*
Inc., 606 P.2d 1089, 1092 (Nev. 1980) (citing Nev. Rev. Stat. § 18.010), *superseded by statute*
on other grounds as stated in Countrywide Home Loans v. Thitchener, 192 P.3d 243, 254 (Nev.
2008); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006), and the
contract in this case provides for attorneys’ fees to the prevailing party in any litigation relating
thereto, (*see* #3-2 ¶ P.4.). Therefore, the \$75,000.01 amount-in-controversy requirement is
satisfied.

lies in a particular district is governed by 28 U.S.C. § 1391. Under the relevant sections of that statute, venue lies where:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

....

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

28 U.S.C. § 1391(a), (c). These are the relevant sections of the statute, because jurisdiction in this case is based purely on diversity of citizenship. (*See* #1 ¶ 11; *see also* Compl. at ¶¶ 24–50, *attached as* #1-1 (pleading only state-law causes of action)). The subsections of § 1391(a) are disjunctive; venue lies if any of these subsections is satisfied for a given district.

Under 28 U.S.C. § 1404, a district court may transfer a case to any other district where venue lies “[f]or the convenience of parties and witnesses” even if venue is proper in the original district under § 1391. § 1404(a). A party may also move for dismissal for improper venue. Fed. R. Civ. P. 12(b)(3). Under 28 U.S.C. § 1406, a district determining that venue is improper has a choice between dismissal or transfer to a district where venue properly lies. *See* § 1406(a). Because it furthers the purpose of judicial economy, a case may be transferred under § 1406(a) even where venue is proper, but where there is no personal jurisdiction over the defendant in the transferor district. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466–67 (1962).

1 When a district court orders a change of venue, the choice of law rules of the transferor
2 jurisdiction follow the case if venue was proper there, *Van Dusen v. Barrack*, 376 U.S. 612, 639
3 (1964), but the choice of law rules of the transferee jurisdiction control where venue (or personal
4 jurisdiction) in the transferor jurisdiction was not proper, *Jackson v. West Telemarketing Corp.*
5 *Outbound*, 245 F.3d 518, 522–23 (5th Cir. 2001); *Nelson v. Int'l Paint Co.*, 716 F.2d 640, 643 (9th
6 Cir. 1983). The transferee court must determine whether the transfer had the effect of curing a
7 defect in personal jurisdiction, and if so, it applies the choice of law rules of the transferee
8 jurisdiction. *Muldoon v. Tropitone Furniture Co.*, 1 F.3d 964, 966–67 (9th Cir. 1993).

9 A district court's rulings on venue are reviewed *de novo*, see *Immigrant Assistance Project*
10 *v. INS*, 306 F.3d 842, 868 (9th Cir. 2002), and underlying factual findings are reviewed for clear
11 error, *Columbia Pictures Television v. Krypton Broad., Inc.*, 106 F.3d 284, 288 (9th Cir. 1997),
12 *rev'd on other grounds*, 523 U.S. 340 (1998).

13 III. ANALYSIS

14 Defendant has moved for a change of venue to the Northern District of Texas based on
15 improper venue in the District of Nevada, not for convenience of the parties and witnesses. (See #3
16 at 2). Therefore, the motion is a request for a transfer under § 1406, not under § 1404, and if the
17 Court grants the motion the U.S. District Court for the Northern District of Texas must then engage
18 in a choice-of-law analysis based on the choice-of-law rules of the State of Texas. *Nationwide Bi-*
19 *weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 141 (5th Cir. 2007); see *Klaxon Co. v. Stentor*
20 *Elec. Mfg.*, 313 U.S. 487, 496 (1941).

21 As Plaintiff notes, 28 U.S.C. § 1441(a) governs venue in removed actions, not § 1391,
22 *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665 (1953), and a party in a removed action may
23 not challenge venue as being improper under § 1406, but may only challenge it as being more
24 convenient elsewhere under § 1404. *PT United Can Co. Ltd. v. Crown Cork & Seal Co.*, 138 F.3d

1 65, 72–73 (2d Cir. 1998). Defendant challenged venue only under § 1406 in its motion but argued
2 under § 1404 in its reply and at the hearing. The Court denies the motion on both grounds.
3 Defendant cannot bring a § 1406 motion in this removed case, and venue is proper in Nevada even
4 if the present motion is considered as one pursuant to § 1404.

5 First, Defendant argues that venue lies in any district in Texas under § 1391(a)(1), because
6 all defendants—there is only one Defendant in this case—reside in Texas. This is true, but it is not
7 the whole truth. Fuqua, the sole Defendant, is incorporated in Delaware and has its principal place
8 of business in Texas, (*see* #1 ¶ 6), making it a resident of either state for the purposes of diversity
9 of citizenship, *see* §§ 28 U.S.C. 1332(c)(1). Defendant fails to note that in the case of corporate
10 defendants such as Fuqua, residency for the purposes of venue is defined even more broadly than
11 is residency for the purposes of diversity of citizenship. Subsection 1391(c) states that for the
12 purposes of venue, “a corporation shall be deemed to reside in any judicial district in which it is
13 subject to personal jurisdiction at the time the action is commenced.” *Id.* Subsection 1391(c)
14 therefore makes residency for the purposes of venue coextensive with the test for personal
15 jurisdiction under the Due Process Clause. If a court of the State of Nevada would have had
16 personal jurisdiction over Fuqua in this case on the date the action was commenced, October 6,
17 2009, (*see* Compl. ¶ 1), then venue is proper in this district, *see* § 1391(c).

18 There is only general jurisdiction over Defendant in Delaware and Texas. Where there is
19 no general jurisdiction, the assertion of specific jurisdiction over a defendant is constitutionally
20 proper under the Due Process Clauses of the Fifth and Fourteenth Amendments when there are
21 sufficient minimal contacts with the forum such that the assertion of personal jurisdiction does not
22 offend “traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. State of Wash.*,
23 *Office of Unemployment Compensation & Placement*, 326 U.S. 310, 316 (1945) (quoting *Milliken*
24 *v. Meyer*, 311 U.S. 457, 463 (1940)). The standard has been restated using different verbiage. *See*
25

1 *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (“[I]t is essential in each case that there be some act
2 by which the defendant purposefully avails itself of the privilege of conducting activities within the
3 forum State, thus invoking the benefits and protections of its laws.” (citing *Int’l Shoe Co.*, 326 U.S.
4 at 319)); *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (“[T]he
5 foreseeability that is critical to due process analysis is not the mere likelihood that a product will
6 find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the
7 forum State are such that he should reasonably anticipate being haled into court there.” (citing
8 *Kulko v. Super. Ct. of Cal.*, 436 U.S. 84, 97–98 (1978))).

9 The Complaint, which is to be believed, alleges that Defendant “at all times relevant to this
10 matter was, doing business in Clark County in the state of Nevada.” (Compl. ¶ 2). This is a
11 conclusory statement that will not support personal jurisdiction. Plaintiff must allege some
12 activities that in fact would support such a claim. Plaintiff alleges only that Defendant’s agents
13 traveled to Las Vegas several times in late 2007 and early 2008 to negotiate, sign, and further
14 discuss the Agreement, and that Plaintiff conducts its business in Clark County, Nevada. (*Id.* ¶¶ 1,
15 5–7). Defendant claims that its Vice President, William beach, signed the Agreement in Texas and
16 never traveled to Nevada. (#3 at 4:3–4). Upon closer review, this is consistent with the Complaint,
17 which only explicitly alleges that “Western” signed the Agreement in Nevada after negotiations
18 with Defendant there.

19 The Fourth Circuit recently held that there was no personal jurisdiction over a foreign
20 defendant in Virginia based on electronic communications the defendant had with plaintiffs in
21 Virginia where the contract was negotiated and signed in Colorado; there was a choice-of-law
22 clause in favor of the law of Colorado; the defendant had no offices, ongoing business, or in-person
23 contact with plaintiffs in Virginia; and the work was to be performed in India. *Consulting Eng’rs*
24 *Corp. v. Geometric, Ltd.*, 561 F.3d 273, 279–80 (4th Cir. 2009). But the Seventh Circuit has held

1 that negotiating and signing a contract in a forum will subject a party to that forum's jurisdiction,
2 without more, even where neither party is a resident of the forum. *In re Oil Spill by Amoco off Coast*
3 *of France on March 16, 1978*, 699 F.2d 909, 917 (7th Cir. 1983) (finding that due process was not
4 offended by the Northern District of Illinois' assertion of personal jurisdiction over French and
5 Spanish parties based on the negotiation and signing in Illinois of a contract to build an allegedly
6 defective Spanish ship that spilled oil near France). The Second Circuit has also found personal
7 jurisdiction proper in New York based purely on the final negotiation and signing of a contract
8 there. *United States v. Montreal Trust Co.*, 358 F.2d 239, 243-44 (2d Cir. 1966).

9 The Ninth Circuit has developed a three-part test: (1) the defendant must have purposely
10 availed itself of the privilege of conducting activities in the forum; (2) the plaintiff's claim must
11 arise out of that activity; and (3) the exercise of jurisdiction must be reasonable. *Shute v. Carnival*
12 *Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1990). The first prong cannot be satisfied merely by
13 entering into a contract with a forum plaintiff. *Roth v. Garcia Marquez*, 942 F.2d 617, 621 (9th Cir.
14 1991) (citing *Burger King v. Rudzewicz*, 471 U.S. 462, 478 (1985)). However, in this case,
15 Defendant negotiated the contract in Las Vegas, and the location was almost certainly selected at
16 least in part for the luxurious amenities and recreational opportunities available in Las Vegas. Also,
17 as in *Roth*, Plaintiff's efforts under the contract were to take place in Nevada where Plaintiff has
18 its offices. *See* 942 F.2d at 622. Because Defendant signed the Agreement in Texas, the question
19 is close, but on balance the Court finds that the first prong is satisfied. The second prong is also
20 close, but the Court finds that it is satisfied based on the contract having been negotiated in Nevada.
21 *See id.* The third prong is itself a seven-factor balancing test under which the Court must consider:
22 "1) the extent of the defendant's purposeful interjection into the forum state's affairs; 2) the burden
23 on the defendant; 3) conflicts of law between the forum and defendant's home jurisdiction; 4) the
24 forum's interest in adjudicating the dispute; 5) the most efficient judicial resolution of the dispute;

1 6) the plaintiff's interest in convenient and effective relief; and 7) the existence of an alternative
2 forum." *Id.* Defendant has minimally injected itself into the affairs of Nevada by visiting the state
3 for negotiations. Although Defendant signed the Agreement in Texas, by doing so it engaged the
4 efforts of a Nevada corporation in Nevada. Defendant corporation will not be unreasonably
5 burdened by defending in Nevada. Conflicts of law are not a concern, because the Agreement
6 contains a choice-of-law clause in favor of Texas law that any forum will likely honor. Neither
7 Nevada nor Texas has a greater interest than the other in adjudicating the dispute—each state is
8 home to one of the parties, and the subject matter of the dispute does not uniquely affect the
9 interests of either state. Neither forum will be able to adjudicate the dispute more efficiently than
10 the other. Although a Texas forum would be more familiar with Texas law than this Court is, this
11 factor no longer carries great weight. In the days before electronic databases such a consideration
12 was more important due to lack of access to other states' reporters and statute books, but today the
13 American courts have immediate electronic access to the law of every state. This Court may
14 research and consider Texas law when ruling on the relatively simple contractual issues in this case
15 just as a Texas court will. Plaintiff's interest in convenient and effective relief is best served by
16 finding venue in Nevada. An alternative forum exists in Texas. When all factors are considered,
17 it is reasonable in this case to require Defendant to defend in Nevada. Defendant could reasonably
18 be expected to defend in Nevada based on its negotiation of a contract in Nevada with a Nevada
19 corporation that was to perform its work under the contract from its Nevada offices. The Court
20 finds that the third prong is satisfied, there is specific jurisdiction over Defendant in Nevada, and
21 therefore venue lies under 28 U.S.C. §§ 1391(a)(1) and (c).

22 Second, Defendant argues that venue does not lie in this district under § 1391(a)(2), because
23 no substantial part of the events or omissions giving rise to the claim occurred in Nevada, and no
24 substantial part of the property that is the subject of the suit is situated in Nevada. Because venue
25

1 lies in the District of Nevada under the “personal jurisdiction” test of §§ 1391(a)(1) and (c), the
2 Court need not engage in an analysis of the more stringent “substantial part” test of § 1391(a)(2).
3 However, the test is satisfied. The alleged wrongful acts concern the Texas Defendant’s failure to
4 make payments to the Nevada Plaintiff. Where should an omission be said to have occurred?
5 Philosophically speaking, an omission “occurs” nowhere, but the Court must construe the language
6 of the statute as sensibly as possible so as to give each term some meaning. The question is where
7 the required act was *expected* to occur if performed as required. Where was payment to occur in
8 this case? Paragraph F of the Agreement is unclear on this point. It indicates that payment was to
9 be made “by check payable to *Dealer*.” (#3-2 ¶ F.7.). Drawing a reasonable inference in favor of
10 the non-movant, the Court finds that Defendant was expected to mail checks from Texas to Plaintiff
11 in Nevada, presumably for deposit there. The act of an interstate payment can be said to occur in
12 two states. The wrong from the failure to mail a check occurs morally in the state where the drawer
13 fails to act but practically in the state where the payee is harmed by lack of payment. The Court
14 therefore finds that the second disjunctive prong of § 1391(a) is satisfied.

15 Third, Defendant argues that under § 1391(a)(3), because there is no district in which the
16 case may otherwise be brought, venue lies in any district where Fuqua was subject to personal
17 jurisdiction when the action was commenced, e.g., the Northern District of Texas. As a matter of
18 statutory interpretation, for corporate defendants § 1391(a)(3) is redundant with §§ 1391(a)(1) and
19 1391(c) read in conjunction. The latter two subsections read together make venue proper for a
20 corporate defendant wherever there is personal jurisdiction over the corporate defendant when the
21 action is commenced. Hence, there will never be any need to resort to § 1391(a)(3) with respect
22 to a corporate defendant, because there will never be a case where “there is no district in which the
23 action may otherwise be brought” where there is personal jurisdiction in any district at all. In other
24 words, because of the broad grant of venue under § 1391(c) with respect to corporate defendants,

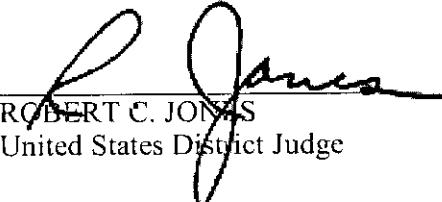
1 a district court will only ever make it to the § 1391(a)(3) analysis where it has already determined
2 there is no jurisdiction in any American court. As discussed, *supra*, under § 1391(a)(3) venue lies
3 in either Nevada or Texas.

4 Defendant also argues that there is a forum selection clause in the Agreement in favor of
5 Texas. Defendant conflates choice of law with forum selection. The clause cited is not a forum
6 selection clause, but a choice-of-law clause. (See #3-2 at ¶ Q.6. ("This agreement shall be governed
7 by and construed in accordance with the laws of Texas, U.S.A.")).

8 **CONCLUSION**

9 IT IS HEREBY ORDERED that the Motion to Change Venue (#3) is DENIED.

10 DATED: This 3rd day of May, 2010.

11
12 
13 ROBERT C. JONES
14 United States District Judge
15
16
17
18
19
20
21
22
23
24
25